83-1481 (1)
No.

In the Supreme Court

OF THE

United States

OCTOBER TERM, 1983

BERNARD PUNIKAIA, et al.,
Petitioners,

vs.

CHARLES CLARK, Director of the
Department of Health for the State of Hawaii,
Individually and in his Official Capacity,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

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QUESTIONS PRESENTED

1. Whether elderly and disabled Hansen's Disease (leprosy) patients living at a facility provided by the state for over three decades are entitled to any due process protections before a state agency terminates all utilities and services to force the patients to move.

2. Whether a state agency may threaten the lives of elderly Hansen's Disease (leprosy) patients still living in a state-run facility by depriving them of all essentials of life, including water, electricity, withdrawal of life-sustaining medication, food and telephones, when other alternatives, such as judicial eviction proceedings, were available.

3. Whether the court below correctly ruled that *O'Bannon v. Town Court Nursing Center* as a matter of law precludes any disabled or elderly litigants from showing the existence of transfer trauma (risk of increased mortality and morbidity when elderly patients are moved) as a constitutionally cognizable interest.

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OPINIONS BELOW

This is a petition for a writ of certiorari to issue to review the judgment and opinion of the United States Court of Appeals for the Ninth Circuit entered on September 7, 1983, which affirmed a decision of the United States District Court for the District of Hawaii.

The opinion of the Ninth Circuit, which appears in the Appendix hereto ("App.") (at 12, *infra*), is reported at 720 F.2d 564 (9th Cir. 1983).

Two prior opinions of the Ninth Circuit in this proceeding also appear in the Appendix. The opinion in *Brede v.*

Director for the Department of Health appears at App. at A-1, *infra,* and is reported at 616 F.2d 407 (9th Cir. 1980). The opinion in *Punikaia v. Yuen* is unreported and is reprinted at App. at A-29, *infra.*

The order of the Ninth Circuit on the motion for rehearing *en banc* dated December 6, 1983, is presently unreported and is reprinted at App. at A-28, *infra.*

JURISDICTION

The judgment of the Court of Appeals for the Ninth Circuit was entered on September 7, 1983. A timely petition for rehearing *en banc* was denied on December 6, 1983, and this petition for certiorari was filed within 90 days of that date. This Court's jurisdiction is invoked under 28 U.S.C. § 1254(1).

CONSTITUTIONAL PROVISIONS AND STATUTES

U.S. Constitution, Amendment XIV, § 1.

Hawaii Revised Statutes, §§ 326 *et seq.*
42 U.S.C. § 247e.

Pursuant to Rule 15.1(f) of the Rules of this Court, the text of the foregoing constitutional provisions and statutes is set forth in the Appendix hereto at A-35 to A-49.

STATEMENT OF THE CASE

A. Summary

Petitioners are Hansen's Disease (leprosy) patients who have undergone a lifelong struggle against physical disability, psychological trauma and social stigma. The statutes of Hawaii refer to Petitioners as "a living memorial to a long history of tragic separation, readjustment and endurance." H.R.S. § 326-40; App. at A-47. Indeed, there is

probably no other group in the history of mankind that has been for so long forcibly ostracized for no fault of their own. This dwindling group, with a history of purposeful unequal treatment, constitutes precisely the type of "discrete and insular" minority which this Court has long held is entitled to heightened judicial protection.

No case of which Petitioners are aware, dealing with the relocation of elderly men and women, involved measures which even approach the brutal coercive tactics employed by the Hawaii Department of Health in removing the Hansen's Disease patients from their home at Hale Mohalu. The cases dealing with "transfer trauma" all discuss the traumatic effect of a move on the assumption that the transfer is carried out in a humane fashion. Such cases are concerned with the more subtle but nonetheless serious losses occasioned by transfer, such as the disruption of ties to close friends and loss of familiar surroundings. Petitioners know of *no* instance where a governmental body has been so audacious as to force patients out from a nursing home or hospital by terminating all utilities and all services without a judicial hearing while the patients remain within. For petitioners, the harms normally associated with transfer trauma were overshadowed by the immediate and life-imperiling deprivations the state inflicted upon them during what could best be described as a "pre-dawn raid".

The decision below officially sanctions the use of life-threatening force against elderly and disabled persons by a state bureaucracy entrusted with the care and health of such persons. If allowed to stand, the decision represents a shocking failure of the legal system to protect the least powerful members of our society.

This case presents pure questions of law. Petitioners were never permitted to have a day in court. Each of the issues now presented to this Court arose in the context of a summary judgment granted against them as a matter of law.

B. Facts

Since the late 1940's, the State of Hawaii has maintained a residential leprosy treatment facility called Hale Mohalu, near Pearl Harbor, Oahu.[1] Petitioners are victims of leprosy who utilized this facility, many for over a quarter of a century, under Hawaii statutes that provide for their treatment and care.[2] Hale Mohalu became both the Petitioners' home and community (RT 146/8-15; 300/25; 302/9; 304/16 - 305/12). In 1978, after allowing conditions to deteriorate, the state Department of Health ("the Department") closed the home and forcibly terminated all services, even though Petitioners still lived there. App. at A-14. In response, petitioners brought the instant suit.

Petitioners are all elderly men and women who contracted the disease when they were young, before effective treatment was developed. They are among the more afflicted of the leprosy population and suffer from numer-

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[1]Leprosy, which is correctly known as Hansen's Disease, is a mildly infectious degenerative disease which produces lesions in the skin, mucous membrane and peripheral nervous system. In its more advanced stages, it affects internal organs and renders its sufferer vulnerable to other diseases such as diabetes and cancer. *See Dorland's Illustrated Medical Dictionary,* 849 (25th ed. 1974).

[2]*See* App. at A-35 to A-48.

ous debilitating illnesses.[3] App. at A-4. Under the isolation laws at the time, many of these people were forcibly taken from their families as young children (RT 300/25-302/9). The Hale Mohalu facility became home for these people subjected to compulsory segregation.

The Hale Mohalu facility was originally established on federal land. In 1956, the United States, which is by federal law required to care for those with Hansen's Disease,[4] conditionally conveyed title of the 11-acre parcel to Hawaii, subject to a 21-year right of re-entry. Two major conditions were that the property permanently be used for leprosy patients and that existing facilities be maintained. Immediately after they obtained title, state bureaucrats, after allowing conditions to deteriorate, tried to close the Hale Mohalu facility and force its residents to transfer to Leahi Hospital in Honolulu. App. at A-14. Before making this decision, the Department did not (1) fairly advise the patients of their intention to close Hale Mohalu and transfer the patients to a hospital; (2) provide the patients with any reasons therefor; or (3) give the patients any opportunity to object.

The patients opposed the Department's plan. They feared the dangerous, potential adverse health effects of "transfer trauma" which a relocation might cause. Also, the Leahi facility, with its sterile hospital environment and location away from shops or services, was ill-suited; the

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[3]For example, one patient, Frank Duarte, contracted leprosy in 1938, and another, Paul Harada, has had it since 1941 (RT 173/10; 123; 124-125/5; 150/16-25). No feeling in the extremeties, amputations and diabetes are among the common maladies suffered by Petitioners. Several are restricted to wheelchairs.

[4]42 U.S.C. § 255 (now 42 U.S.C. § 247e) provides for care of leprosy victims by the federal government. App. at A-47.

Hale Mohalu facility, in contrast, provided the residents with spacious grounds and a warm, non-hostile environment.

Hale Mohalu was technically closed on January 26, 1978. App. at A-13. A majority of the patients, having no acceptable place to go, remained at Hale Mohalu. The state provided services until September 1, 1978. On that day, instead of seeking a court order for the transfer, state officials resorted to life-threatening self-help to forcefully coerce the patients to transfer. State employees arrived at 6:00 a.m. and ordered the nurses to leave. All medicines were removed, and the patients were told that no food service would be provided. Electrical lines were cut and removed, the main water valve was closed and shackled, and the telephone was ripped out of the wall. (RT 358/19 - 365/25; 553/17; 619/19 - 621/5; 827/17 - 828/1; 119/12 - 121/7).

Following this early morning raid, all state employees left the grounds. In their wake they left one patient who had been on kidney dialysis (RT 127/72 - 129/17; 133/1 - 133/4), one who was a diabetic and required daily insulin injections (RT 118/25 - 119/11), and others who, despite crippled hands, now had to change their own bandages (RT 156/2 - 156/5). A physician treating some of the patients testified that the Department's actions created life-threatening conditions. (RT 233/4-235/6). With no medical supplies, lights, or telephone to call for help in an emergency, these elderly people were helpless.[5]

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[5]For example, when one patient began to hemorrhage during the night, the other patients had no lights by which to see or phone to call for an ambulance. Fortunately, the patients were able to call an ambulance with a walkie-talkie, and the sick patient was rushed unconscious to a hospital where he arrived in critical condition. (RT 365/24-367/16).

C. Proceedings and Rulings Below

On September 5, 1978, the Petitioners filed a complaint in the U.S. District Court to enjoin the Department from closing Hale Mohalu, raising substantial federal due process and 42 U.S.C. § 1983 claims. The complaint was dismissed for "lack of standing" on September 21, 1978. Petitioners appealed and the first of three Ninth Circuit panels to hear the case reversed. App. at A-1. The court found that "[t]he state has statutorily conferred upon leprosy patients an entitlement to treatment . . .," *id.* at A-7, and that "[t]o the extent . . . that transfer trauma is a possible result of the state's decision to relocate the Hale Mohalu patients, relocation may constitute a deprivation cognizable under the due process clause." *Id.* at A-9.

On remand, the district court denied Petitioners' motion for preliminary relief. Again, Petitioners appealed. A second, different Ninth Circuit panel reiterated the holding in *Brede,* and remanded again in an unpublished order. App. at A-29.

Upon remand, Petitioners moved for partial summary judgment on their due process claims. The district court not only denied the motion, but *sua sponte* entered summary judgment in favor of the state. Petitioners appealed. This time another panel of the Ninth Circuit affirmed. App. at A-12. On December 6, 1983, the court denied Petitioners' petition for rehearing. App. at A-28.

REASONS FOR GRANTING THE WRIT

I

THE DECISION BELOW SERIOUSLY MISCONSTRUES AND EXTENDS O'BANNON v. TOWN COURT NURSING CENTER AND FINDS THAT DIRECT DEPRIVATIONS OF LIFE AND LIBERTY BY THE GOVERNMENT ARE NOT SUBJECT TO ANY DUE PROCESS SAFEGUARDS; THE DECISION BELOW THUS REMOVES LONGSTANDING CONSTITUTIONAL SAFEGUARDS FOR RESIDENTS OF GOVERNMENT-RUN INSTITUTIONS

The Ninth Circuit's holding purports to rest squarely on this Court's decision in *O'Bannon v. Town Court Nursing Center*, 447 U.S. 773 (1980).[6] In fact, the decision below reads out of existence the central holding and critical limiting principle of *O'Bannon*. The court below, admitting that *O'Bannon* is not direct authority because it involved a private facility, nevertheless found that *O'Bannon* controls this case. App. at A-19. The decision below rejects this Court's central distinction between direct and indirect gov-

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[6]Due to factual conflicts which would otherwise preclude summary judgment, the court below relied directly on *O'Bannon, supra*, to affirm as a matter of *law* the district court's *sua sponte* grant of summary judgment. App. at A-20. The court below also used *O'Bannon* to justify its departure from the law of the case as established by two prior and different panels of the Court of Appeals. *See* App. at A-21; *see also* Statement of the Case at 7, *supra*. The opinion below not only re-writes the majority opinion of Justice Stevens by ignoring the direct-indirect distinction so carefully crafted into that opinion, but also ignores the concurring opinion of Justice Blackmun. The opinion below totally rejects Justice Blackmun's "four distinct considerations" which led him to concur, and also ignores the concurring opinion's view that it would find a liberty interest at stake whenever "a governmental decision . . . imposes a high risk of death or serious illness . . ." 447 U.S. at 802.

ernmental deprivations of liberty or property. Because this application of *O'Bannon* is so incorrect and extreme, and its implications so far-reaching, this Court should grant certiorari to reconcile the significant conflict between the opinion below and *O'Bannon*, and the dangerous extension of both the majority and concurring opinions.

O'Bannon held that nursing home residents have no due process rights to a pretermination hearing when their private facility is decertified for Medicaid benefits by the federal government. 447 U.S. at 790. The action of the government there was directed against the private nursing home and did not involve the withdrawal of *direct* benefits. *Id.* at 787. Any impact on patients in *O'Bannon* was only an incidental effect of the government's attempt to prevent substandard care.

Despite the clarity of *O'Bannon*, the Court of Appeals refused to follow this crucial distinction. The decision below, for the first time in the jurisprudence of this country, sanctions government action against its own citizens which *directly* deprives those citizens of their legal rights without due process, and thus also conflicts with this Court's decision in *O'Bannon*.

O'Bannon was, or should have been, definitive: "[W]e hold that the enforcement by HEW and DPW of their valid regulations did not *directly* affect the patients' legal rights or deprive them of any constitutionally protected interest in life, liberty, or property." 447 U.S. at 790 (emphasis added). In stark contrast, this case involves local government agency actions directed at petitioners, with direct adverse impact on them. Here, the Department is

closing its own home and medical facility. There is nothing indirect about what the state did here. Their actions were aimed directly at the residents with Hansen's Disease.

The crux of *O'Bannon* is that the patients' problems were caused by the nursing home which allowed conditions to deteriorate. In fact, the Court suggested the possibility of damages against the nursing home. 447 U.S. at 787. However, here the state operated the home and allowed conditions to deteriorate. The Department and no third party was responsible for every act of which petitioners complain.

Moreover, the government agency not only ran the residence but both ordered and carried out the forcible transfer of petitioners. This is critically different from *O'Bannon,* where the patient transfers were the indirect effect of decertification. As this Court held, such indirect effect ". . . is not the same for purposes of due process analysis as a decision to transfer a particular patient . . . ." 447 U.S. at 786.

Despite these constitutionally significant differences,[7] the Court of Appeals found that "*O'Bannon* controls the dis-

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[7]Among other numerous differences, the total absence of any due process sets this case apart from *O'Bannon.* As Justice Blackmun observed (concurring), "[t]he home has been afforded substantial procedural protections, and, throughout the process, has shared with the patients who wish to stay there an intense interest in keeping the facility certified." 447 U.S. at 797. Thus, the home served as a representative of the patients. *Id.* Also, HEW requires patient interviews as a part of its periodic review of a facility's qualification and thereby provides patients with input. *Id.* at 784 n.15.

Moreover, decertification involves enforcement of specific statutory and regulatory standards. In the present case, however, the state's decision to close Hale Mohalu was unrestrained by any standards, statutory or otherwise.

position of this case." App. at A-19. The court below, which found the state's decision to close Hale Mohalu "closely analogous" to the government's decertification of a private hospital for failure to maintain minimum health and safety standards," *id.* at A-20, demonstrates that it completely misunderstood, or simply rejected, this Court's decision in *O'Bannon.* It then used *O'Bannon* as a springboard to create novel and dangerous constitutional doctrine.

In *O'Bannon,* the Court reiterated the principle that due process safeguards do not apply to the indirect adverse effects of governmental action. 447 U.S. at 789. The court below turns this principle on its head and incredibly holds that due process does not apply when individuals suffer the direct adverse effects of governmental action. App. at A-27.

Indeed, the Court of Appeals' application of *O'Bannon* is so extreme that the decision below conflicts with all other courts which have interpreted *O'Bannon.* All others until now have adhered to the "simple distinction between government action that directly affects a citizen's legal rights, or imposes a direct restraint on his liberty, and action that is directed against a third party and affect the citizen only indirectly . . . ." 447 U.S. at 788.[8]

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[8] *O'Bannon* previously has been found controlling *only* where the government action indirectly affects the individual. *See, e.g., Grove City College v. Bell,* 687 F.2d 684, 704 (10th Cir. 1982), *cert. granted,* 103 S.Ct. 1181 (1983) (No. 82-825, 1982 Term) (no pretermination hearing required for students where private college's eligibility for financial aid terminated); *Geriatrics Inc. v. Harris,* 640 F.2d 262, 264 (10th Cir. 1981), *cert. denied,* 454 U.S. 832 (1981) (decertification of private nursing home); *Dima v. Macchiarola,* 513 F.Supp. 565, 568-89 (E.D.N.Y. 1981) (transfer of handicapped students merely indirect effect of city's refusal to renew contract

(footnote continued on next page)

This is not the first time that the Ninth Circuit has seriously misapplied *O'Bannon*. In *Bumpus v. Clark*, 681 F.2d 679 (9th Cir. 1982), *reh. denied and opinion withdrawn*, 702 F.2d 826 (9th Cir. 1983), residents of a county-owned nursing home sought to enjoin the closing of the home by the county. The court stated that *O'Bannon* "precludes a holding that the County's decision to close Edgefield and the State's refusal to step in and preserve the status quo are sorts of direct state action which constitute deprivations of life or liberty". 681 F.2d at 686. The court found no difference between indirect decertification and the state's decision to close its own facility, holding that "the County's action in this case no more directly affects plaintiffs than did the action of the State in *O'Bannon* . . . ." 681 F.2d at 686. The Ninth Circuit later withdrew its opinion in *Bumpus, supra*, finding the case moot. 702 F.2d 826 (9th Cir. 1983).

This Court should grant this petition for certiorari in order to insure that its decision in *O'Bannon* is not ren-

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(footnote cont'd.)

with private school); *Heille v. City of St. Paul, Minn.*, 512 F.Supp. 810, 815 (D. Minn. 1981), *aff'd*, 671 F.2d 1134 (8th Cir. 1982); *Caton v. Barry*, 500 F.Supp. 45, 52 (1980) (governmental decision to terminate contractual relationship with private shelter for homeless).

O'Bannon has until now been found inapposite in cases involving direct government action. *See, e.g., Spivey v. Barry*, 665 F.2d 1222, 1228 (D.C. Cir. 1981) (closing of public health clinic); *Jeffries v. Georgia Res. Fin. Auth.*, 503 F.Supp. 610, 616 (N.D. Ga. 1980), *aff'd*, 678 F.2d 919 (11th Cir. 1982), *cert. denied*, 103 S.Ct. 302 (1982) (property interest exists where agency's termination procedures directly affect plaintiffs' receipt of federal rent subsidies); *Swann v. Gastonia Housing Authority*, 502 F.Supp. 362, 366-67 (W.D. N.C. 1980), *aff'd in part, rev'd in part*, 675 F.2d 1342 (4th Cir. 1982). *Cf. Copisto v. Califano*, 89 F.R.D. 374, 379-80 (D.N.J. 1981).

dered meaningless and is properly applied within the boundaries delineated by the Court.

II

THE COURT BELOW FOUND AS A MATTER OF LAW THAT A STATE'S TERMINATION OF ALL ESSENTIAL UTILITIES AND WITHDRAWAL OF LIFE-SUSTAINING MEDICATIONS DO NOT CONSTITUTE A DEPRIVATION OF THE PATIENTS' INTERESTS IN LIFE, LIBERTY AND PROPERTY WITHOUT DUE PROCESS

The first Ninth Circuit panel to hear this case found that Hawaii "has statutorily conferred upon leprosy patients an entitlement to treatment at some state leprosarium". App. at A-7. Indeed, Hawaii obtained the land from the federal government after World War II only by promising (a) to maintain the existing Hansen's Disease facilities, and (b) to build a "permanent" leprosarium. The court recognized that this "entitlement to treatment . . . requires a measure of due process protection which may not have been provided in this case." App. at A-8. It is axiomatic that the state's deprivation of services and removal of medication and medical staff constituted a deprivation of the patients' entitlement to care and treatment.[9]

[9]The court below found no deprivation because the state provided alternative facilities. App. at A-20. The Department gave petitioners the "choice" usually presented by street thugs—relinquish your property or risk losing your life. These alternative facilities were in no meaningful sense available options for the patients in light of the risk of suffering adverse physical effects caused by being forcibly moved. As the *Brede* court recognized, the very risk of increased morbidity and mortality, one aspect of which is sometimes known as "transfer trauma", requires a pre-termination hearing. App. at A-9. Thus, petitioners were entitled to continue to receive care and treatment at Hale Mohalu until some hearings were held on the transfer trauma issue.

This court has recognized that the "right to be free from . . . unjustified intrusions on personal security" is among the historic liberties protected by the due process clause of the Fourteenth Amendment. *Ingraham v. Wright,* 430 U.S. 651, 673 (1977). *See also Grosjean v. American Press Co.,* 297 U.S. 233, 244 (1935) ("word 'liberty' contained in [the fourteenth] amendment embraces not only the right of a person to be free from physical restraint, but the right to be free in the enjoyment of all his faculties as well").

Taken together, the *Brede* panel's decision and the decisions of this Court establish that Petitioners have fundamental rights of entitlement to care and treatment, of personal security, and of life itself. By unnecessarily and knowingly threatening the health and lives of Petitioners, the Department infringed on all of these substantive rights.

Restrictions on fundamental rights can only be justified by compelling state interests and the means chosen to affect these interests must be narrowly drawn, or in other words, they must be "least drastic means." *See, e.g., Roe v. Wade,* 410 U.S. 113, 155 (1973); *Police Dept. of Chicago v. Mosley,* 408 U.S. 92, 101 n.8 (1971). *See also Beller v. Middendoct,* 632 F.2d 788, 807-08 (9th Cir. 1980), *reh. denied sub nom. Miller v. Rumsfeld,* 647 F.2d 80 (9th Cir. 1981), *cert. denied,* 454 U.S. 855 (1981), *reh. denied,* 454 U.S. 1069 (1981). Assuming *arguendo* that the bureaucracy possessed a compelling interest in closing Hale Mohalu, this interest could have been easily effectuated without threatening Petitioners' lives. For example, officials from the Department of Health could have sought a court order directing the patients to vacate by a certain date; if the patients continued to resist, law enforcement personnel would have

escorted the patients off the property. This would have been far safer than "pulling the plug" while helpless and elderly patients continued to occupy the facility.

Even if the patients' liberty interests are not deemed "fundamental" and no infringement of their fundamental right to life is found, the state's termination of utilities and withdrawal of medication still fail to pass constitutional muster because these actions do not bear a rational relation to the asserted government interest. *See, e.g., Whalen v. Roe,* 429 U.S. 589, 596-98 (1978). *See also Beller,* 632 F.2d at 808. Even if the state could lawfully close Hale Mohalu without holding a pretermination hearing, it was arbitrary and totally unreasonable for it to do so while ailing and elderly patients continued to reside at the facility. In short, it was unreasonable for the Department to threaten Petitioners' lives by depriving them of water, light and medication in order to close Hale Mohalu.

As described above, the state could have easily had the patients removed before it terminated services. The tactics used by the state in this case clearly bear no rational relation whatsoever to the state's interest in protecting Petitioners' health. The state in effect asserts, and the court below was apparently in agreement, that it should be allowed to board up and close down a building even though people remain inside, in order to "protect" these people. Such arbitrary, irrational and unrestrained exercise of government authority is not entitled to receive a judicial stamp of approval.

This case thus poses the issue of the extent to which this society will constitutionally tolerate arbitrary government action which unreasonably and unnecessarily imperils life.

In a case such as this, where elderly and sick individuals are involved, the state's actions are especially alarming. Denying these people food, water and medical necessities "shocks the conscience". *See Rochin v. California,* 342 U.S. 165, 172 (1952). Indeed, the Hawaii Health Department treated these frail and long-suffering people worse than criminals could lawfully be treated in that state.[10]

The state's termination of services, now sanctioned by the federal judiciary, was completely lawless. Department bureaucrats neither attempted to obtain a court order, nor did they resort to any other judicial process whatever.[11] Instead, these authorities took the law into their own hands.

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[10]The use of excessive force to accomplish a lawful objective constitutes a deprivation cognizable under the due process clause of the fourteenth amendment; thus, police may not use excessive force against criminal suspects they arrest. *See, e.g., Bauer v. Norris,* 713 F.2d 408, 411-13 (8th Cir. 1983); *U.S. v. Harrison,* 671 F.2d 1159, 1162 (8th Cir. 1982), *cert. denied,* 103 S.Ct. 104 (1982) (lack of provocation or need to use force makes any use of force excessive); *Hamilton v. Chaffin,* 506 F.2d 904, 909 (5th Cir. 1975).

[11]The government took measures here which other landowners are forbidden to take. Such self-help tactics have been widely rejected. *See Restatement (Second) Property,* §§ 14.1 to 14.3 (1976). The Uniform Residential Landlord and Tenant Act (ULTRA) expressly prohibits landlords from terminating essential services, and from using other self-help tactics. *See* ULTRA §§ 4.104, 4.107, 4.207, 4.301(c) and 4.302. The modern trend is to restrict landlords to use the judicial process in order to regain possession. Even where helf-help is permitted, landlords are entitled to use only "'such reasonable force as [is] necessary, short of that which threatened death or serious bodily harm, to regain possession.'" *Kaufman v. Abramson,* 363 F.2d 865 (4th Cir. 1966), *quoting Shorter v. Shelton,* 183 Va. 819, 33 S.E. 2d 643, 646 (1945) (affirming exemplary damage award against landlord who terminated electricity; without air-conditioning, increased temperature aggravated elderly stroke victim's condition and could have caused another attack).

They denied food, water, light, heat, refrigeration and medicine to the very people they are statutorily obligated to care for. This sort of unrestrained governmental activity is of course characteristic of totalitarian regimes, where law operates to legitimize such tactics instead of restricting them. All that Petitioners desired was to remain in their home of many years and not be transferred until it was determined that a relocation would not threaten severe physical hardship and injury.[12]

As was found by the Ninth Circuit in *Brede,* Petitioners had a right to receive continued medical treatment and services at Hale Mohalu at least until a pre-termination hearing was held to determine the possible transfer trauma effects that relocation to Leahi Hospital might cause. App. at A-10. Even if the state could have lawfully closed Hale Mohalu without affording a due process hearing, this does not justify terminating life-support services while old and sick people remained within.

III

THE DECISION BELOW HELD THAT FREEDOM FROM TRANSFER TRAUMA CAN NEVER BE A CONSTITUTIONALLY COGNIZABLE INTEREST AS A MATTER OF LAW

The Court of Appeals not only misapplied *O'Bannon,* but decided issues involving highly important due process

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[12]There exists no state in this country that does not make available a judicially sanctioned eviction proceeding which serves as a buffer between landlord and tenant and a safeguard against abuses of the weak and powerless in the moving process. Whatever the merits of the closings of such public institutions, if it is not done with a rigorous regard for the constitutional rights of those who find themselves in their last years dependent upon state bureaucracies, then the opportunity for physical and psychological abuse of the elderly and disabled, as well as a wanton disregard for their most important legal rights, is certain to result.

concerns and having dangerous implications. Specifically, the decision below sanctioned state-inflicted transfer trauma[13] and approves state use of life-threatening tactics without due process safeguards to affect its will.

This Court in *O'Bannon* did not decide that freedom from state-inflicted transfer trauma, if proven, can be a constitutionally cognizable interest requiring due process protections. Note, *Liberty From Transfer Trauma: A Fundamental Life and Liberty Interest,* 9 Hastings Const. L.Q. 429, 433-36 (Winter 1982). The Court recognized that the transfer of patients may cause some of the patients to suffer "severe emotional and physical hardship . . . ." 447 U.S. at 785 n.16. However, enforcement by the Department of Health, Education and Welfare of their regulations was not a due process deprivation because of the "distinction between *government action* that directly affects a citizen's legal rights, or imposes a direct restraint on his liberty, and action that is directed against a third party and affects the citizens only indirectly or incidentally . . . ." *id.* at 788 (emphasis added). Moreover, the potential harm caused by transfer trauma was allegedly merely as an adjunct to the patients' main allegation of an entitlement to continued occupancy. 447 U.S. at 777.

Because there were no government actions directed at the patients, any transfer trauma in *O'Bannon* was not inflicted by the state. In contrast, had petitioners ever been allowed to present evidence, this case squarely presents the issue of state-inflicted transfer trauma because

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[13]"Transfer trauma" is the current term used by the medical profession to describe the higher mortality and morbidity rates which result from the movement of elderly and infirm men and women. The phenomena is not new and in previous years has sometimes been called "relocation stress".

here the state has acted directly upon Petitioners by ordering their transfer to other state facilities.

The holding below, ostensibly based on *O'Bannon,* that state-inflicted physical and psychological harm called transfer trauma, cannot ever constitute a deprivation cognizable under the due process clause directly affects the lives of tens of thousands of elderly individuals receiving health care benefits in government-operated facilities. These senior citizens are entitled to some measure of protection from state practices aimed directly at them and which pose an immediate threat to their lives and well being. The decision below stands for the proposition that the state may treat individuals in its care in any way it sees fit, regardless of the adverse, life-threatening effects of such treatment. As a result, the frail and infirm,[14] at least within the jurisdiction of the Ninth Circuit, are now at the mercy of a bureaucracy's unfettered discretion to make decisions which literally threaten their lives. That was clearly not this Court's intent when it decided *O'Bannon.*

CONCLUSION

The court below has added another sad chapter to Hawaii's long history of inhumane treatment of persons

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[14]As a result of taxpayer revolts and withdrawal of federal funding in recent years, as well as an increased emphasis on community health care, an unprecedented number of publicly-run institutions have been forced to shut down. Hundreds more of such institutions will be closing their doors in the next several years. The decision below has critical implications for all of the occupants of such institutions, as well as for our society at large. The opinion of the Ninth Circuit would allow such government-run facilities to be abruptly shut down by self-help and with a callous disregard for the lives, as well as the interests, of those who live there. The Constitution requires more.

affected by Hansen's Disease. Petitioners have been deprived of their home and community of over thirty years, even though both the federal government and the state had previously specifically acknowledged the special legal obligation to them.

Petitioners' compulsory segregation began in Biblical times (*see* Leviticus 8:4-5), and most of the petitioners were forcibly taken from their mothers and fathers when they were small children.

Petitioners have undergone a lifelong struggle against physical disability, psychological trauma and social stigma. Indeed, there is probably no other group in the history of mankind that has been for so long forcibly ostracized for no fault of their own. The word "leper" has become synonymous with the pathetic and helpless outcast. This dwindling group, with a history of purposeful unequal treatment, constitutes precisely the type of "discrete and insular" minority which this Court has long said is entitled to heightened judicial protection.

These are the helpless men and women whom a state bureaucracy attacked. The Department withdrew insulin from known diabetics, took nurses away and cut off the electricity needed to store the medicines to keep them alive. The decision below officially sanctions the arrogant attempt of a state bureaucracy entrusted with the care and health of disabled elderly people to deliberately bypass the judicial process. To achieve its end, the state was willing to risk the lives of all of these people, and then literally ripped out their telephone service so that they could not even call for emergency help. Such conduct would be universally condemned under the legal principles of most states. The due process clause guarantees Petitioners a

minimum right to personal security, which includes a right not to be placed in physical jeopardy by the knowing actions of state officials. When such officials place people in physical danger, particularly when they are elderly or otherwise helpless, as Respondent has done here, their conduct must be justified as reasonably relating to legitimate government objectives.

Respondent, when he resorted to self-help, had neither a writ of possession issued by a court of competent jurisdiction, nor the assistance of professional trained law enforcement personnel whose job is to enforce laws against alleged trespassers.

Resolution of conflicting claims is best left to the judicial system, where justice, and not force determine the ultimate rights of the parties. Modern notions of due process leave no room for landlords to be judges of their own causes.

Petitioners urge that this petition be granted so that these issues of extreme importance can be heard and decided by the Court.

DATED: March 5, 1984

Respectfully submitted,

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ANITA P. ARRIOLA
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(Appendices follow)

APPENDIX I

David Brede, Frank Duarte, Mary Duarte, Paul Harada, Clarence Naia, Leon Nono, Francis Palea, Jubilee Pudhala, Bernard Punikaia, Bernice Pupule, Richard Pupule, Antonion Sagadraca, and Shivuku Sagadraca, Plaintiffs-Appellants,

vs.

Director for the Department of Health for the State of Hawaii, and John Does 1-30, Individually and in their capacity as agents of the Department of Health, State of Hawaii, Defendants-Appellees.

No. 78-3152.

United States Court of Appeals,
Ninth Circuit.

March 3, 1980.
Rehearing Denied April 21, 1980.

Before TRASK and FERGUSON, Circuit Judges, and SOLOMON,* District Judge.

TRASK, Circuit Judge:

For many years, the State of Hawaii has maintained a leprosarium on the Kalaupapa peninsula on the island of Molokai. Beginning in the late 1940's, Hawaii has also maintained a residential facility of just over 11 acres at Hale Mohalu near Pearl City, Oahu. This facility was established in order to enable those leprosy patients who were in need of more sophisticated medical care than was

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*Honorable Gus J. Solomon, Senior United States District Judge for the District of Oregon, sitting by designation.

available at Kalaupapa, to live near Honolulu hospitals where expensive equipment and better medical care was available.[1] The Hale Mohalu facility was originally established on federal land. The United States, in return for a commitment by the State of Hawaii to provide care for the state's leprosy sufferers, conveyed the land to the state, subject to a twenty-one year maintenance condition.[2]

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[1]Leprosy, which is also known as Hansen's disease, is a mildly infectious degenerative disease caused by the micro-organism *Mycobacterium leprae*. The disease produces lesions in the skin, the mucous membranes, and the peripheral nervous system. In its more advanced stages, it affects internal organs and renders its sufferers vulnerable to other diseases such as diabetes and cancer. *See Dorland's Illustrated Medical Dictionary* 849 (25th ed. 1974). Leprosy is endemic to subtropical climates such as that of Hawaii. In 1952, there were more cases of leprosy in Hawaii than there were in the remainder of the United States. *See* S.Rep. No. 1335, 82d Cong. 2d Sess. *reprinted in* [1952] U.S. Code Cong. & Admin.News, pp. 1630, 1631. [Hereinafter Senate Report].

[2]The United States conveyed the land in fee simple subject to a condition subsequent. The conveyance was by quitclaim deed, which incorporated by reference an Application for Purchase with Discount submitted by Hawaii which application stated:

> This real property will be used by the Territory of Hawaii on a permanent basis for a Hansen's disease hospital facility.

The Quitclaim deed provides in pertinent part:

> 1. That for a period of twenty (20) years from the date of this deed the above described property herein conveyed shall be utilized continuously for public health purposes in accordance with the proposed program and plan as set forth in the application of the said GRANTEE dated June 24, 1955, and for no other purpose.
>
> 3. That one year from the date of this deed and annually thereafter for the aforesaid period of twenty (20) years, unless the Secretary [of Health, Education and Welfare], or his successor in function, otherwise directs, the GRANTEE will file with the Department [of H.E.W.], or its successor in function, reports on the operation and maintenance of the above described property and will furnish, as requested, such other

Hawaii nevertheless failed to maintain the facility over the years, permitting it to deteriorate to some extent. The federal government, however, did not utilize its right to require maintenance. On March 23, 1977, the United States' right of entry expired and Hawaii's title to Hale Mohalu became a fee simple absolute. Shortly thereafter, the state began proceedings to close the facility and move its residential and medical support services to Leahi Hospital in Honolulu.

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pertinent data evidencing continuous use of the property for the purpose specified in the above identified application.

In the event of a breach of any of the conditions set forth above . . . all right, title and interest in and to the above described property shall, at its option, revert to and become property of the UNITED STATES OF AMERICA, which in addition to all other remedies for such breach, shall have an immediate right of entry thereon, and the said GRANTEE, its successors, or assigns, shall forfeit its right, title, and interest in and to the above described property . . . PROVIDED FURTHER, that in the event the UNITED STATES OF AMERICA fails to exercise its option to re-enter the premises for any such breach of said conditions within twenty-one (21) years from the date of the conveyance, the conditions set forth above together with all right of the UNITED STATES OF AMERICA to re-enter as in this paragraph provided, shall, as of that date, terminate and be extinguished.

The GRANTEE shall at its own sole cost and expense keep and maintain the improvements, including all buildings, structures and equipment, at any time situated upon said property, in good order, condition and repair, free from any waste . . .. Should the GRANTEE, its successors or assigns, fail to repair or replace any improvements which need repair or which have been lost, damaged or destroyed as aforesaid within ninety (90) days after written notice to do so, given to the GRANTEE by the Secretary, or his successor in function, the GRANTOR shall be authorized as agent of the GRANTEE, its successors and assigns, to enter upon the premises and to cause such repairs or replacements to be made on the behalf and at the expense of the GRANTEE.

A number of the facility's residents, in appreciation of the residential nature of Hale Mohalu with its private or semi-private living quarters and easy access to friends and family, chose to remain. Over the last decade, advances in medical science have enabled physicians to treat leprosy patients through outpatient services. As a result, the inpatient residents remaining at Hale Mohalu were among the more elderly, afflicted, and crippled of the leprosy population.

On January 26, 1978, the Hale Mohalu facility was officially closed. In recognition of the continued residence of those patients who had decided to remain, the state provided water, electric power, telephone service, food, medical care, and supplies until September 1, 1978, when all these services were terminated. On September 5, a number of those patients still at Hale Mohalu filed the instant suit and a temporary restraining order was entered compelling the state to restore all services. On September 21, 1978, a federal district court denied appellant's motion for a preliminary injunction and dismissed their complaint for lack of standing and for failure to state a claim upon which relief may be granted.

On appeal, appellants raise a number of issues, most of which are without substantial merit. Appellants, however, do raise the possibility that they have a property interest in the form of a legitimate entitlement to continued medical care and residential facilities at the Hale Mohalu leprosarium, which interest may not be deprived without due process. We find the record inadequate to determine whether such an entitlement exists. If it does, certain due process protections, such as a pre-termination hearing, may

be required. Consequently, we remand for further proceedings.

The quoted portions of the deed evidence not only the obligation of the State of Hawaii to maintain the Hale Mohalu site, but further evidences the requirement that the facility be used to provide Hawaii's Hansen's disease patients with a medical care facility. Hawaii's obligation to provide leprosy sufferers with care and treatment was also codified. See Haw.Rev.Stat. § 326-1, note 5, infra.

I

Appellants claim an interest in receiving medical care at the Hale Mohalu facility. This interest may be a property interest protected by the due process clause of the Fifth Amendment if it is more than a "unilateral expectation." Board of Regents v. Roth, 408 U.S. 564, 577, 92 S.Ct. 2701, 2709, 33 L.Ed.2d 548 (1972). "[T]here must exist rules or understandings which allow the claimant's expectations to be characterized as 'a legitimate claim of entitlement' to [the benefit]." Stretten v. Wadsworth Veterans Hospital, 537 F.2d 361, 366 (9th Cir. 1976) (quoting Board of Regents v. Roth, 408 U.S. 564, 577, 92 S.Ct. 2701, 2709, 33 L.Ed.2d 548 (1972)). "The source of legitimate claims of entitlement is not the Constitution but rather the acts of the sovereign, state or federal, manifested in legislation, rules, or customs." Moore v. Johnson, 582 F.2d 1228, 1233 (9th Cir. 1978). See also Memphis Light, Gas & Water Division v. Craft, 436 U.S. 1, 9, 98 S.Ct. 1554, 56 L.Ed.2d 30 (1978).

Appellants' claim is narrow—they assert an entitlement to continued operation of the Hale Mohalu leprosarium.

There are two possible sources for this claim. First, appellants contend that the Hale Mohalu facility qualifies as a Medicaid "intermediate care facility" within the meaning of 42 C.F.R. § 449.10(b)(15) (1977).[3] If the appellants are correct in their assertion, then, under the patient transfer regulations for such facilities, a patient may not be transferred except for "medical reasons or for his welfare or that of other patients, or for nonpayment of his stay."[4] Administrators of intermediate care facilities do not, therefore, have the power to arbitrarily transfer patients for any reason. Under these regulations, patients at such facilities would have a "legitimate entitlement to continued residency at the [facility] of [their] choice." Klein v. Califano, 586 F.2d 250, 258 (3d Cir. 1978).

From the record as it now stands, it is impossible to determine whether Hale Mohalu is, in fact, an intermediate

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[3]The 1977 regulations were those in effect at the time Hale Mohalu was officially closed and are therefore controlling.

[4]42 C.F.R. § 449.12(a)(1)(ii)(B)(*4*). The pertinent portions of this regulations state:

> (a) The standards for an intermediate care facility (as defined in § 449.10(b)(15) of this part) which are specified by the Secretary pursuant to section 1905(c) and (d) of the Social Security Act and are applicable to all intermediate care facilities are as follows. The facility:
>
> (1) Maintains methods of administrative management which assure that:
>
> (ii) There are written policies and procedures available to staff, residents, their families or legal representatives and the public which:
>
> (B) Ensure that each resident admitted to the facility:
>
> (4) Is transferred or discharged only for medical reasons or for his welfare or that of other patients, or nonpayment of his stay (except as prohibited by the title XIX program).

care facility which is subject to the Medicaid regulations. If it is an intermediate care facility, however, the appellants are entitled to a fact-finding hearing as to the cause of their transfer. See Klein v. Califano, supra, at 258-59.

II

An alternative basis for appellant's claim to an entitlement may derive from Hawaii state law and from the hardship which a transfer may impose on Hale Mohalu patients. The state has statutorily conferred upon leprosy patients an entitlement to treatment at some state leprosarium.[5] Another state statute, however, grants the Hawaii Health Department the unrestricted power to prescribe the place of treatment.[6] Taken together, these statutes appear to

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[5]Haw.Rev.Stat. § 326–1 provides:

> Establishment of hospitals, etc.; treatment and care of persons affected with leprosy. The department of health, subject to the approval of the governor, shall establish hospitals, settlements and places as it deems necessary for the care and treatment of persons affected with leprosy.
>
> At every such hospital, settlement, and place there shall be exercised every reasonable effort to effect a cure of such persons, and all such persons shall be cared for as well as circumstances will permit, and given such liberties as may be deemed compatible with public safety and in the light of advances in medical science and in accordance with accepted practices elsewhere. Every patient shall be encouraged to take complete treatment so that prompt recovery can be attained and shall be discharged as soon as possible. The treatment shall be compulsory only in those cases where in the opinion of the department, such treatment is necessary to save life or prevent obvious physical suffering, and the department may take such measures as may be necessary to enforce this section.

[6]Haw.Rev.Stat. § 326–3 provides in pertinent part:

> Care in other hospitals, homes, etc. Notwithstanding any of the provisions of this chapter or of any other chapter relating

authorize patient transfers "at will" and therefore the Hale Mohalu residents would enjoy no more than a "unilateral expectation" to continued services at that facility. However, while appellants may have no entitlement to services at Hale Mohalu under Hawaii statutory law, appellant's entitlement to treatment at *some* facility requires a measure of due process protection which may not have been provided in this case.

Under the two-part test of Board of Regents v. Roth, supra, and Goldberg v. Kelly, 397 U.S. 254, 90 S.Ct. 1011, 25 L.Ed.2d 287 (1970), once an entitlement to threatened services or benefits is established, it then becomes necessary to determine what process is due. The cases have recognized that when the deprivation of some government benefit would operate so as to impose severe hardship upon individuals with an entitlement to that benefit, due process protection in the form of a pretermination hearing may be required. See Goldberg v. Kelly, supra at 260-62, 90 S.Ct. at 1016–17. Here, there is no doubt that the appellants are entitled to care provided by the state. The state may not act so as to reduce these services to the point of imperiling life or imposing other severe hardship without affording the recipients a pretermination hearing. See Mathews v. Eldridge, 424 U.S. 319, 340, 96 S.Ct. 893, 905, 47 L.Ed.2d

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to this subject matter, the department of health may make arrangements for the care and treatment of any person within the jurisdiction at any hospital, nursing home or convalescent home in the State, either public or private, and bear all expenses of the hospitalization and treatment and any other necessary expenses in the same manner as though the person were confined at any hospital, settlement or place for the care and treatment of persons affected with leprosy established under section 326–1.

18 (1976); Goldberg v. Kelly, supra, 397 U.S. 1016–18 at 260–63; Curlott v. Campbell, 598 F.2d 1175, 1181 (9th Cir. 1979).

In the present case, transferring the Hale Mohalu patients to Leahi Hospital may work such a reduction in benefits. There has been considerable judicial and scientific recognition of the phenomenon known as "transfer trauma." See Bracco v. Lackner, 462 F.Supp. 436, 444–45 (N.D.Cal. 1978); Klein v. Mathews, 430 F.Supp. 1005, 1009–10 (D.N.J. 1977); Burchette v. Dumpson, 387 F.Supp. 812, 819 (E.D. N.Y.1974). Transfer trauma is characterized by physical and emotional deterioration as well as by increased rates or mortality. "The basic principle of the phenomenon is the recognition that the transfer of geriatric patients to any unfamiliar surroundings produces an increased rate of morbidity and mortality." Bracco v. Lackner, supra at 445. The degree to which this phenomenon is applicable to the leprosy patients presently resisting transfer from Hale Mohalu to Leahi Hospital is unclear on this record. To the extent, however, that transfer trauma is a possible result of the state's decision to relocate the Hale Mohalu patients, relocation may constitute a deprivation cognizable under the due process clause. See Klein v. Mathews, supra at 1010. Cf. Moore v. Johnson, 582 F.2d 1228, 1234 (9th Cir. 1978) (no pretermination hearing required when complaint failed to allege "inhumane and harsh" means of relocating Veterans Administration Hospital patients).

III

Upon establishing their right to due process protection, appellants become entitled to a hearing. It has been sug-

gested, however, that any requirement for a hearing has already been satisfied. The State Health Planning and Development Agency apparently held a hearing before Hale Mohalu was officially closed. The record is too sketchy, however, for this court to determine the extent to which the appellants were represented, adequacy of the notice given, or the adequacy of the hearing itself. It is therefore necessary to remand this case to the district court. On remand, the court should hold hearings designed to ascertain whether the plaintiffs have an entitlement to services at Hale Mohalu arising from either the Medicaid regulations or from the possibility that transfer of Hale Mohalu services to Leahi Hospital could impose a severe hardship on the plaintiffs. If such an entitlement exists, then the adequacy of the hearing already held must be ascertained, and any hearings necesary to afford appellants due process should be held. The case is remanded for further proceedings consistent with this opinion.

APPENDIX II

United States Court of Appeals
For the Ninth Circuit

No. 82-4189
CV 78-0336 SPK

Bernard Puniakaia,
Plaintiffs-Appellants,

vs.

Charles G. Clark, Director of the Department of Health,
State of Hawaii,
Defendant-Appellee.

JUDGMENT

Appeal from the United States District Court for the District of Hawaii.

This cause came on to be heard on the Transcript of the Record from the United States District Court for the District of Hawaii and was duly submitted.

On consideration whereof, it is now here ordered and adjudged by this Court, that the judgment of the said District Court in this cause be, and hereby is affirmed.

Filed and entered September 7, 1983.

Bernard Punikaia, David Brede, Frank Duarte, Mary Duarte, Clarence Naia, Francis Palea, Bernice Pupule and Richard Pupule, et al., Plaintiffs-Appellants,

vs.

Charles G. Clark, Director of the Department of Health for the State of Hawaii, individually and in his official capacity, Defendant-Appellee.

No. 82-4189.

United States Court of Appeals,
Ninth Circuit.

Argued and Submitted May 10, 1983.
Decided Sept. 7, 1983.

Appeal from the United States District Court for the District of Hawaii.

Before BROWNING, Chief Judge, and WRIGHT and WALLACE, Circuit Judges.

WALLACE, Circuit Judge:

Ten leprosy patients (the patients), some of whom live at the Hale Mohalu leprosarium near Honolulu, sued to enjoin the State of Hawaii from closing that facility. The patients claim that a variety of state and federal statutes, regulations, written contracts, and customs, create both a property and liberty interest in the form of a legitimate entitlement to continued medical care and residential facilities at Hale Mohalu. They contend that this entitlement prohibits the state from closing the facility, or alternatively, that it requires the state to provide them with a hearing before closure. The district court found that the

patients possessed no legitimate entitlement and granted summary judgment in favor of the state. We affirm.

I

Because there was a dispute on the factual issue of residency, for purposes of this appeal we assume that the patients are residents of both the state leprosarium at Kalaupapa on the island of Molokai and the residential facilitiy at Hale Mohalu on the island of Oahu. The latter facility was established on federal land in the 1940s to enable Kalaupapa residents who needed sophisticated medical care to live near the Honolulu hospitals where expensive equipment and better medical care were available. In 1956, the federal government conveyed the land on which Hale Mohalu is situated to the State of Hawaii on condition that the state use the land for a leprosarium and that it maintain the Hale Mohalu facility, subject to a twenty-one year right of reentry. Brede v. Director for the Department of Health, 616 F.2d 407, 409 (9th Cir. 1980) (Brede). Although the facility was permitted to deteriorate somewhat, the federal government did not utilize its right to require maintenance. In March 1977, both the federal government's right of entry and the conditions contained in the quit-claim deed expired, and the state's title to Hale Mohalu became absolute. Id. at 409-10.

Due to the dilapidated and unsafe conditions of the buildings at Hale Mohalu, and for economic reasons, the state subsequently sought to close the facility and move the residential and medical support services to Leahi Hospital in Honolulu. On January 26, 1978, Hale Mohalu was closed officially. Those living there were permitted either to transfer to Leahi Hospital or to return to the leprosarium at Kalaupapa.

Although Leahi Hospital apparently is more modern and in better condition than Hale Mohalu, some residents felt uncomfortable moving from the older facility and chose to remain at Hale Mohalu. The state continued to provide these patients with basic services, such as water, electric power, telephone service, food, medical care, and supplies until September 1, 1978, when all services were terminated.

On September 5, 1978, the patients obtained a temporary restraining order from the district court compelling the state to restore all services, and sued to enjoin the state from closing Hale Mohalu. On September 21, 1978, the district court denied the patients' motion for a preliminary injunction and dismissed their complaint for lack of standing and for failure to state a claim upon which relief may be granted. We reversed, stating that the patients had "raise[d] the possibility that they ha[d] a property interest in the form of a legitimate entitlement to continued medical care and residence facilities at the Hale Mohalu leprosarium, which interest may not be deprived without due process." Id. at 410. We specifically identified two possible sources of such an entitlement: (1) Medicaid regulation, 42 C.F.R. § 449-12(a)(1)(ii)(B)(4)(1977), and (2) the possibility that transfer of Hale Mohalu services to Leahi Hospital could impose a severe hardship on patients. We found, however, the record inadequate to determine whether an entitlement existed under either of these theories, and whether, therefore, the state was required to provide the patients with a preterminating hearing. We remanded the case to the district court. Id. at 410-12.

On remand, the patients filed an amended complaint alleging additional causes of action. The patients' motion

for a temporary restraining order and preliminary injunction was denied by a second district judge. On appeal, we filed an unpublished order again remanding to the district court to hold an evidentiary hearing and make a new determination on the issuance on a preliminary injunction.

After this remand, the case was heard by a third district court judge. The patients moved for partial summary judgment based on their due process claims. The district judge denied the motion and sua sponte entered summary judgment in favor of the state. We then dismissed the appeal of the preliminary injunction as moot. We now decide the patients' appeal of the district court's denial of a permanent injunction.

II

As we stated in Brede, to establish a property interest in receiving medical care at the Hale Mohalu facility, the patients must demonstrate that they possess more than a "unilateral expectation" of continued service. Id. at 410, quoting Board of Regents v. Roth, 408 U.S. 564, 577, 92 S.C. 2701, 2709, 33 L.Ed.2d 548 (1972); see also Perry v. Sindermann, 408 U.S. 593, 601, 92 S.Ct. 2694, 2699, 33 L.Ed. 2d 570 (1972). The source of the patients' claim of entitlement must be "the acts of the sovereign, state or federal, manifested in legislation, rules, or customs." Brede, 616 F.2d at 410, quoting Moore v. Johnson, 582 F.2d 1228, 1233 (9th Cir. 1978).

The patients' primary claim is that a series of Hawaii statutes pertaining to the treatment of leprosy patients confers the necessary entitlement to treatment a Hale Mohalu whether or not a hearing is granted. We have

already dealt with this issue in Brede. We concluded that although "[t]he state ha[d] statutorily conferred upon leprosy patients an entitlement to treatment at some state leprosarium . . . [t]aken together, these statutes appear to authorize patient transfers 'at will' and therefore the Hale Mohalu residents would enjoy no more than a 'unilateral expectation' to continued services at that facility." 616 F.2d at 411 (footnote omitted). The patients argue that our use of the word "appear" indicates that we did not decide this question definitively; moreover, they argue, they are now citing statutory provisions that were not cited to the court in Brede. They are wrong. Taken in context, we indicated that the statutory scheme was not crystal clear but we held what the statutes appeared to us to mean. Our phraseology does not diminish the finality of our holding. We need not reexamine our holding but even if we did so, we would not depart from Brede.

Although the question whether patients possess a property or liberty interest is governed by federal constitutional law, the preliminary question whether a state statutory scheme substantively limits the state's discretion or permits it to act "at will" is one of state law. Memphis Light, Gas & Water Division v. Craft, 436 U.S. 1, 9-11, 98 S.Ct. 1554, 1560-1561, 56 L.Ed.2d 30 (1978). The statutes and regulations cited by the patients ensure that leprosy patients will receive treatment at some state leprosarium, Hawaii Rev. Stat. § 326-1 (1976 & Supp. 1982), that patients at Hale Mohalu will receive treatment equal to that received by patients at Kalaupapa, id. § 326-2, that patients at Kalaupapa will be permitted to transfer to Hale Mohalu and vice versa, id. § 326-11, that the residents of Kalaupapa may remain there for the rest of their lives, id. § 326-40 (Supp.

1982), and that patients will not be transferred from one hospital to another without their consent. Hawaii Public Health Reg. 27-6. The district court found, however, that these various statutory provisions were superseded by Hawaii Rev. Stat. § 326-3 (1976 & Supp.1982), which states that "[n]otwithstanding any of the provisions of . . . chapter [326] or of any other chapter relating to [the treatment of leprosy patients]," the Department of Health is authorized to make arrangements for the care and treatment of leprosy patients.

Based on his reading of the statutes and analysis of their legislative history, the district judge concluded that the state had complete discretion to close Hale Mohalu and transfer its patients to alternative facilities. Thus, he reached the same conclusion as we reached in Brede. Two other Hawaii district court judges and an Hawaii State Circuit judge also have reached the same conclusion.[1] The interpretation of Hawaiian law by these Hawaiian judges is not clearly wrong. Jablonski v. United States, 712 F.2d 391 at 397 (9th Cir.1983). The patients have failed to establish an entitlement to continued treatment at Hale Mohalu based on the Hawaii statutes.

III

We turn next to the two possible sources of entitlement specifically mentioned in Brede. 616 F.2d at 410-12. First,

[1]The patients brought suit in the Hawaii state court on January 20, 1978, six days before the closing of Hale Mohalu, seeking a temporary restraining order prohibiting the transfer of patients to Leahi Hospital. The state circuit judge denied the patients' motion for a preliminary injunction, stating that, "Section 326–3, Hawaii Revised Statutes, overrides other laws (including rules and regulations) and authorizes the Department of Health to make arrangements at Leahi Hospital for the care and treatment of any person within the state affected with leprosy."

we concluded in Brede that the patients' "entitlement to treatment at some facility requires a measure of due process protection which may not have been provided in this case." Id. at 411 (emphasis in original). We stated that where patients are entitled to care provided by the state, "[t]he state may not act so as to reduce these services to the point of imperiling life or imposing other severe hardship without affording the recipients a pretermination hearings." Id. at 412. We concluded that such "severe hardship" would exist if the patients could demonstrate that the closing of the Hale Mohalu facility and the proposed transfer would cause "transfer trauma." We remanded the case to the district court because the record was unclear as to the extent to which the leprosy patients resisting transfer to the Leahi Hospital would suffer transfer trauma. Id.

The state argues that the district judge found on remand that the patients at Hale Mohalu would not suffer transfer trauma by moving to Leahi Hospital or back to Kalaupapa. The state admits, however, and the record reveals that the transfer trauma issue was disputed before the district court. Thus, it cannot be the basis for affirming the district court's grant of summary judgment. State ex rel. Edwards v. Heimann, 633 F.2d 886, 888 (9th Cir. 1980); Fed.R.Civ.P. 56(c). The question is whether we can uphold the judgment when we specifically instructed the district court to make a factual finding as to the transfer trauma phenomenon, see *Brede,* 616 F.2d at 410, 412, and the district court did not do so.

Since Brede, the Supreme Court decided O'Bannon v. Town Court Nursing Center, 447 U.S. 773, 100 S.Ct. 2467, 65 L.Ed.2d 506 (1980) (*O'Bannon*). There, the Supreme

Court held that nursing home patients' interest in receiving care at a particular facility was insufficient to entitle them to a hearing prior to decertification of that facility by either the federal or state government. The Court recognized that decertification would result indirectly in the transfer of the nursing home's patients. 'It also assumed "for purposes of [the] decision that there is a risk that some residents may encounter severe emotional and physical hardship as a result of a transfer." Id. at 784 n. 16, 100 S.Ct. at 2475 n. 16. Nevertheless, the Court distinguished governmental action which results indirectly in transfers of patients from direct transfers of particular patients or reductions in their benefits. The Court stated:

> Although decertification will inevitably necessitate the transfer of all those patients who remain dependent on Medicaid benefits, it is not the same for purposes of due process analysis as a decision to transfer a particular patient or to deny him financial benefits, based on his individual needs or financial situation.

Id. at 786, 100 S.Ct. at 2475. The Court reasoned that in decertifying a facility the government confers an indirect benefit by ensuring safer facilities for all nursing home residents. Such governmental enforcement action may have an indirect adverse impact on residents of the affected facility, but such impact does not amount to a deprivation of any interest in life, liberty, or property. Id. at 786-88, 100 S.Ct. at 2475-76.

O'Bannon is not direct authority because it involved the decertification of a private facility by the government, not a state's closing of its own facility. Nevertheless, we find that O'Bannon controls the disposition of this case. The

state's decision to close the hospital for safety and economic reasons is closely analogous to the government's decertification of a private hospital for failure to maintain minimum health and safety standards. Due process does not require us to impede the state's ability to provide safe facilities and to make economically sound decisions which will allow it to provide the best treatment for the greatest number of patients. Moreover, since the state has continued to provide for leprosy patients by permitting them to transfer to the modern and well equipped Leahi Hospital, or return to Kalaupapa where they are currently registered, the state has not reduced the patients' benefits. Thus, under the reasoning of O'Bannon, the patients do not have an entitlement to services at Hale Mohalu.

The patients attempt to distinguish their case from O'Bannon, citing Yaretsky v. Blum, 629 F.2d 817 (2d Cir. 1980), rev'd on other grounds, ... U.S. ....., 102 S.Ct. 2777, 73 L.Ed.2d 534 (1982) (Yaretsky). The Second Circuit there held that Medicaid patients' interest in avoiding the effects of transfer from trauma is a constitutionally protected liberty interest where such trauma results from the transfer of a patient from a lower to a higher level of care within existing Medicaid nursing homes. Id. at 821. Yaretsky, however, involved direct transfers of particular patients between existing facilities, not indirect transfers resulting from a decision to decertify or close a facility. Id. at 819. Thus, even assuming the soundness of the Second Circuit's reasoning, the case is not applicable.

Turning to the second possible source of entitlement explicitly mentioned in Brede, we stated that if Hale Mohalu qualified as a Medicaid "intermediate care facility" the

leprosy patients would have a "legitimate entitlement to continued residency at the [facility] of [their] choice." Brede, 616 F.2d at 410-11, quoting Klein v. Califano, 586 F.2d 250, 258 (3d Cir. 1978). This conclusion was based on our interpretation of 42 C.F.R. § 449.12(a)(1)(ii)(B)(4) (1977), which limits the reason for which a patient in a Medicaid "intermediate care facility" may be transferred. See Brede, 616 F.2d at 411 n. 4. The district judge on remand concluded that these regulations would not apply because Hale Mohalu was not an "intermediate care facility," but a "skilled nursing facility."

We need not discuss this asserted difference between types of facilities because we are foreclosed following our own suggestion in Brede due to the Supreme Court's decision in O'Bannon. In O'Bannon, the Court held that 42 C.F.R. § 405.1121(k)(4), which applied to skilled nursing facilities and which is identical to 42 C.F.R. § 449.12(a)(1)(ii)(B)(4) in all relevant respects, does not give rise to an entitlement to continued care at a particular facility. 447 U.S. at 780 & n. 9, 785-88, 100 S.Ct. at 2473 & n. 9, 3475-76. Although the regulations limit the ability of Medicaid facilities to transfer patients, such limits are not applicable to transfers indirectly resulting from decertification of a facility. Id. at 786-88, 100 S.Ct. at 2475-76. The same reasoning applies to the closing of a facility.

Thus, the patients failed on remand to establish an entitlement under either of the two possible bases we set out in Brede.

IV

The patients next suggest a variety of other possible sources for an entitlement to continued care at Hale

Mohalu. The state argues that we are foreclosed by Brede from considering any of these further arguments. It interprets our language in Brede that "appellants raise a number of issues, most of which are without substantial merit," 616 F.2d at 410, as a rejection of any arguments other than the two we have just considered. The patients argue that this passage refers to other claims made to the court in Brede which were abandoned following our decision in that case. Since we did not make clear which claims were "without substantial merit," we will consider the patients' remaining entitlement claims presented in this appeal.

The patients first contend that the government may not terminate utilities and other essential services without first granting residents a notice and a hearing, citing Memphis Light, Gas & Water Division v. Craft, 436 U.S. 1, 98 S.Ct. 1554, 56 L.Ed.2d 30 (1978). But in that case, the Supreme Court based its determination of an entitlement to continued utility service on state law which prohibited the utility company from terminating services "except for good and sufficient cause." Id. at 11, 98 S.Ct. at 1561. The patients cite no Hawaii statute similarly limiting the Board of Health's power to terminate utility services.

The patients argue, however, that even without an entitlement based on state law, Brede forbids the state from creating a life-threatening situation by cutting off utilities. They rely upon our statement that given the patients' right to at least some care provided by the state, the state could not "act so as to reduce . . . services to the point of imperiling life or imposing other severe hardship without affording the recipients to pretermination hearing." 616 F.2d at 412.

This language, however, refers to the transfer trauma phenomenon, not to whether a hearing is required before a government may close one of its own facilities. Unlike the injuries resulting from transfer trauma, any life-threatening danger resulting from the state's termination of utility services was self-inflicted because the patients voluntarily remained after the facility was closed. If we were to accept the patients' analysis, an occupant of a government facility could remain, as a trespasser, despite the government's attempt to close the facility, and obtain a pretermination hearing on the theory that a termination of essential utilities would pose a life-threatening danger. We reject such an unprecedented interpretation of the due process clause. It was sufficient in this case that the state gave the patients notice before closing the facility and provided alternative facilities for them.

The patients cite Mathews v. Eldridge, 424 U.S. 319, 340, 96 S.Ct. 893, 905, 47 L.Ed.2d 18 (1976), and Goldberg v. Kelly, 397 U.S. 254, 260-63, 90 S.Ct. 1011, 1016-18, 25 L.Ed.2d 287 (1970), as authority for their claim. These cases state only that once a plaintiff has established a legitimate entitlement to a particular benefit, the degree of potential deprivation resulting from a particular decision is a factor which may be considered in determining whether he receives a hearing before or after termination of his benefits. Mathews v. Eldridge, 424 U.S. at 340, 96 S.Ct. at 905. Such cases are inapplicable because the patients have not demonstrated an entitlement to continued care at Hale Mohalu.

We also reject the patients' claim to an entitlement as a utility user based on Kaufman v. Abramson, 363 F.2d 865 (4th Cir. 1966). The plaintiff's suit in that case was for damages under state law; the court did not find any entitlement which would require a pretermination hearing. We express no opinion as to whether the patients may have a cause of action for damages under state law for the state's termination of utility services on September 1, 1978.

The patients next claim a property interest under various Hawaii landlord/tenant laws, see Hawaii Rev.Stat. ch. 666 (1976 & Supp.1982), and public housing laws, see id. §§ 360-2; 360-3. The district judge held that the patients were not "tenants" in a contractual sense under Hawaii law, and that Hale Mohalu could not be characterized as public housing; therefore, he held that the cited statutes were inapplicable. These interpretations of state law are not clearly wrong. The patients also cite cases from other circuits for the proposition that even absent statutory provisions, residents of public housing must be afforded a hearing prior to eviction. See Caulder v. Durham Housing Authority, 433 F.2d 998 (4th Cir. 1970), cert. denied, 401 U.S. 1003, 91 S.Ct. 1228, 28 L.Ed.2d 539 (1971); Escalera v. New York City Housing Authority, 425 F.2d 853 (2d Cir.), cert. denied, 400 U.S. 853, 91 S.Ct. 54, 27 L.Ed.2d 91 (1970). Again, these cases are not relevant because the patients are not public housing tenants.

The patients next contend that the state's provision of continuous care at Hale Mohalu for thirty years constitutes a "custom" or "regularity of performance" creating more than a unilateral expectation in continued residency at Hale Mohalu. Custom may give rise to a legitimate entitlement.

Brede, 616 F.2d at 410; Moore v. Johnson, 582 F.2d at 1233. Nevertheless, the state's continuous operation of Hale Mohalu over several years cannot be characterized as a "custom" which generates a property interest. Otherwise, the government could never close an institution which it has maintained for a long time without granting a pretermination hearing for the individual residents of that institution. Such restriction on governmental action is not required by the due process clause. See Connecticut Board of Pardons v. Dumschat, 452 U.S. 458, 465, 101 S.Ct. 2460, 2464, 69 L.Ed.2d 158 (1981) ("A constitutional entitlement cannot 'be created—as if by estoppel—merely because a wholly and expressly discretionary state privilege has been granted generously in the past.' ", quoting Leis v. Flynt, 439 U.S. 438, 444 n. 5, 99 S.Ct. 698, 701 n. 5, 58 L.Ed.2d 717 (1979) (per curiam); see also O'Bannon, 447 U.S. at 785 n. 17, 100 S.Ct. at 2475 n. 17 (dicta).

Although they have been unable to establish an entitlement under any of the individual theories, the patients claim, without citing any authority, that the combination of state statutes, custom, contractual obligations, and state regulations, taken together, give rise to a property interest protectible under the fourteenth amendment. Such a theory was presented to and rejected by the Supreme Court in O'Bannon, 447 U.S. at 781 n. 12, 785, 100 S.Ct. at 2473 n. 12, 2475.

Turning from state to federal law, the patients claim an entitlement under 42 U.S.C. § 247e which specifies that the Public Health Service must receive into a hospital "suitable for his accommodation" any person afflicted with leprosy.

As the district judge correctly observed, however, this statute does not limit public health administrators' discretion to determine in which "suitable" facility a particular leprosy patient will be placed. Although section 247e may give rise to a private suit by a patient who claims that a particular facility is not a "suitable accommodation," it does not confer an entitlement to services at a particular facility.

The patients argue finally that they are entitled to continued residency at Hale Mohalu, whether or not a hearing is granted, as third-party beneficiaries of the quitclaim deed executed by the federal government to the State of Hawaii. The patients contend that the contract required the state to maintain a "permanent" leprosarium, that the provision has been violated by the state, and that their rights as third-party beneficiaries did not expire with the federal government's right of entry. Even assuming that the patients qualify as third-party beneficiaries, their argument fails. Although the deed requires that the state use the property for a leprosarium "on a permanent basis," and that the state maintain the buildings at Hale Mohalu, it also explicitly states that the conditions set forth in the deed, along with the right to re-enter, shall terminate and be extinguished twenty-one years following the date of the deed. Thus, the conditions terminated on March 23, 1977. Brede, 616 F.2d at 409 n. 2. The rights of a third-party beneficiary are limited by the contract between the promisor and the promisee. 4 A. Corbin, Contracts §§ 810, 818 (1951); 2 S. Williston, Contracts § 364A (3d ed. 1959). The parties intended the conditions and, hence, any rights to enforce those conditions, to expire in twenty-one years;

third-party beneficiaries cannot exercise rights that the parties did not intend them to have.

In conclusion, because the patients have not demonstrated a legitimate entitlement to residence and continued services at Hale Mohalu, the due process clause does not require that they be granted a hearing before the state may close that facility. We therefore need not decide whether the patients were afforded sufficient notice and hearings to satisfy the fourteenth amendment.

AFFIRMED.

APPENDIX III

United States Court of Appeals
For the Ninth Circuit

No. 82-4189

D.C. No.
CV-78-0336 SPK

Bernard Punikaia, David Brede, Frank Duarte, Mary Duarte, Clarence Naia, Francis Palea, Bernice Pupule and Richard Pupule, et al.,

Plaintiffs-Appellants,

-vs-

Charles G. Clark, Director of the Department of Health for the State of Hawaii, individually and in his official capacity,

Defendant-Appellee.

[Filed Dec. 6, 1983]

ORDER

Appeal from the United States District Court for the District of Hawaii

Before: BROWNING, Chief Judge, and WRIGHT and WALLACE, Circuit Judges

The panel, as constituted above, has voted to deny the petition for rehearing and to reject the suggestion for rehearing en banc.

The full court has been advised of the suggestion for rehearing en banc, and no judge of the court has requested a vote on the suggestion for rehearing en banc. Fed. R. App. P. 35(b).

The petition for rehearing is denied, and the suggestion for rehearing en banc is rejected.

APPENDIX IV

United States Court of Appeals
For the Ninth Circuit

No. 80-4433
D.C. No. CV-78-03

Bernard Punikaia, David Brede, Frank Duarte, Mary Duarte, Clarence Naia, Francis Palea, Bernice Pupule and Richard Pupule, et al.,

Plaintiffs-Appellants,

v.

George A. L. Yuen, Director of the Department of Health for the State of Hawaii, individually and in his official capacity,

Defendant-Appellee.

[Filed Nov. 27, 1981]

Appeal from the United States District Court
for the District of Hawaii
The Honorable Samuel P. King, Presiding
Argued and Submitted November 10, 1981

ORDER

Before: BAZELON,* HUG and BOOCHEVER, Circuit Judges.

This appeal of an order denying a preliminary injunction reaches us one year and four months after the order was issued. It is apparent that the conditions upon which the request for relief is based may have changed substantially

*The Honorable David L. Bazelon, Senior United States Circuit Judge for the District of Columbia Circuit, sitting by designation.

since that time. In addition, our ability to determine whether the denial of injunctive relief was an abuse of discretion is severely hampered by the State's failure to provide an evidentiary basis for its claims and by the lack of findings of fact and conclusions of law by the district court. We are therefore compelled to remand the case for reconsideration of the plaintiffs' motion in a manner consistent with the terms of this order.

I

The order of the district court was issued in response to the plaintiffs' objections to the magistrate's report. Although the order agrees with the magistrate's recommendation that relief be denied, it does not adopt the findings or conclusions of the magistrate's report. We therefore need not consider here the factual findings and conclusion reached by the magistrate.

It is apparent from the order of the district judge that he believed that the matter should be heard on the merits as soon as possible and anticipated that it would be heard in the near future. This may well have formed part of the reason for his denial of the preliminary injunction, because he believed the granting of the injunction would require extensive remodeling of the facilities, which he was reluctant to order until the merits of the matter had been determined. If there were evidentiary support for the view that plaintiffs seek a mandatory injunction requiring substantial alteration of the status quo, this approach would be within the court's discretion. Anderson v. United States, 612 F.2d 1112, 1114 (9th Cir. 1979). However, the relief expressly sought by the plaintiffs is much more limited than that anticipated by the district court. They seek only

restoration of minimal services including water, electricity, telephone, the services of one nurse, medical supplies and limited janitorial services. They characterize the relief sought as an injunction that prohibits the termination of vital services and thus maintains the status quo as it existed prior to the state action. Whether the judge was justified in rejecting this view cannot be determined from this record. It is apparent that some of the plaintiffs continue to live at Hale Mohalu with whatever hazards to health and safety exist. It is doubtful that these hazards are ameliorated by the termination of basic services. Our review requires an explicit characterization of the relief and identification of the evidence supporting it.

The plaintiffs argue strenuously that the wrong legal standard was applied by the district court. Unquestionable use of an improper standard would be an abuse of discretion Al-Kim, Inc. v. United States, 650 F.2d 944, 948 (9th Cir. 1979); Los Angeles Memorial Coliseum Commission v. National Football League, 634 F.2d 1197, 1200 (9th Cir. 1980). The correct standard for granting preliminary injunctive relief has been clearly and repeatedly stated by this court. The plaintiff's burden is satisfied with a demonstration of either (1) a combination of probable success on the merits and the possibility of irreparable injury, or (2) that serious questions are raised and the balance of hardships tips sharply in the plaintiff's favor. White Mountain Apache Tribe v. State of Arizona, 649 F.2d 1274, 1285 (9th Cir. 1981); Wm. Inglis & Sons Baking Co. v. ITT Continental Baking Co., 526 F.2d 86, 88 (9th Cir. 1975).

We have no indication as to the standard the district court applied. Even if we were convinced, however, that

a legal error had been made, we would be unable to correct that error by ordering that the injunction issue. The standard mandates flexibility in dealing with pertinent facts and applicable law. It relies upon the trial judge to evaluate four separate evidentiary factors and their interrelationships. These factors include: (1) likelihood of success on the merits, (2) possibility of irreparable injury to plaintiff, (3) comparable hardship to defendant, and (4) effect on public interest. Los Angeles Coliseum, 634 F.2d at 1200.

In an earlier opinion, this court analyzed one factor: the likelihood of success on the merits. Brede v. Director for Department of Health, etc., 616 F.2d 407 (9th Cir. 1980). That opinion indicated that the plaintiffs' claims do have some merit, and we expressly reject the magistrate's conclusion to the contrary. The plaintiffs' amendment of their complaint, filed after our opinion in Brede was issued, adds other substantive claims to those considered in Brede and may thus enhance the chances of the plaintiffs' success. However, we cannot view these legal claims in isolation from the other requirements for injunctive relief. Under our standard, the plaintiffs' burden on the merits is reduced in proportion to the magnitude of their injury. The minimum burden imposed on the plaintiffs is a showing of a "fair chance of success on the merits" or that the claim poses questions "serious enough to require litigation." Benda v. Grand Lodge of Internation Association of Machinists & Aerospace Workers, 584 F.2d 308, 315 (9th Cir. 1978), cert. dismissed, 441 U.S. 937 (1979). Our holding in Brede that these plaintiffs had stated a claim for relief so that dismissal was error, means that at least

the minimal showing has been satisfied. Whether that minimum is sufficient in this case can only be determined in relation to the remaining factors, with special emphasis on the injury to be suffered by the plaintiffs if relief is denied. On the present record, we cannot evaluate any balance drawn by the trial judge in considering these factors. Furthermore, the lapse of time requires consideration of the factors under the present circumstances.

II

Based on the foregoing considerations, the order of this court is as follows:

1. The district court shall hold an evidentiary hearing to determine the following questions, among others it may consider important:

a. Which of the named plaintiffs are now living at Hale Mohalu? Are they full-time or part-time residents? Were all of those persons who are now at Hale Mohalu there at the time the State closed the facility?

b. If basic services were restored at Hale Mohalu, would other members of the plaintiff class return to the facility? If so, how many would return?

c. What would be the cost to the State of reinstating and providing water and utility service, food delivery, telephone services, medical supplies and nursing and janitorial services? How do those costs compare to the cost of providing care for the plaintiffs if they were at Leahi Hospital?

d. Are the buildings that constitute the living facilities at Hale Mohalu an imminent hazard to life and health? If so, what would be the cost of making the

facility reasonably safe for temporary use pending a final decision in this case?

e. What is the nature of the facility at Leahi Hospital? What type of living accommodations are provided and what resrtictions are imposed upon the occupants?

f. Are the plaintiffs who have already moved to Leahi Hospital suffering disadvantanges that they would not have suffered at Hale Mohalu?

g. What is the source and nature of the food, medical and utility services presently available to the plaintiffs at Hale Mohalu? To what degree do these provisions adequately serve the plaintiffs' basic needs?

h. At oral argument before this court the parties referred to a residence facility constructed adjacent to Leahi Hospital subsequent to issuance of the district court order. (The facility was variously referred to as a "cabin" or a "home-like facility.") How does the cost expended by the State to construct this facility compare to the cost of providing the requested basic services at Hale Mohalu? How do those construction costs compare to projected costs for necessary restoration or remodeling at Hale Mohalu, if any?

2. The district court shall make specific and detailed findings of fact as to these questions. Based on those findings, it shall make a new determination on the issuance of a preliminary injunction.

3. The findings of fact and the determination to injunctive relief shall be returned to court within forty-five days from the date of this order.

APPENDIX V

CHAPTER 326

LEPROSY

§ 326-1 Establishment of hospitals, etc; treatment and care of persons affected with leprosy. The department of health, subject to the approval of the governor, shall establish hospitals, settlements, and places as it deems necessary for the care and treatment of persons affected with leprosy.

At every such hospital, settlement, and place there shall be exercised every reasonable effort to effect a cure of such persons, and all such persons shall be cared for as well as circumstances will permit, and given such liberties as may be deemed compatible with public safety and in the light of advances in medical science and in accordance with accepted practices elsewhere. Every patient shall be encouraged to take complete treatment so that prompt recovery can be attained and shall be discharged as soon as possible. The treatment shall be compulsory only in those cases where, in the opinion of the department, such treatment is necessary to save life or prevent obvious physical suffering, and the department may take such measures as may be necessary to enforce this section. [L 1909, c 81, § 1; RL 1925, § 1183; am L 1931, c 139, § 5; am imp L 1933, c 118, § 2; RL 1935, § 1140; RL 1945, §2401; am L 1949, c 53, § 1; am L 1951, c 157, § 1; L 1953, JR 41, § 5; RL 1955, § 50-1; am L Sp 1959 2d, c 1, § 19; HRS § 326-1; am L 1969, c 152, § 2]

§ 326-3 Equal treatment of patients. Every leprosy patient at Hale Mohalu and Kalaupapa shall be accorded as nearly equal care and privileges as is practicable under the different operating conditions of the two institutions. [L

1953, JR 41, § 7; RL 1955, § 50-2; HRS § 326-2; am L 1969, c 152, § 1]

§ 326-3 Care in other hospitals and homes, etc. Notwithstanding any of the provisions of this chapter or of any other chapter relating to this subject matter, the department of health may make arrangements for the care and treatment of any person within the jurisdiction at any hospital, nursing home, or convalescent home in the State, either public or private, and bear all expenses of the hospitalization and treatment and any other necessary expenses in the same manner as though the person were confined at any hospital, settlement, or place for the care and treatment of persons affected with leprosy established under section 326-1. Any moneys at any time appropriated for the care of patients or maintenance of the hospital, settlement, or place established under section 326-1 may be used by the department to pay any hospital, nursing home, or convalescent home with which the department has made such arrangements. When such arrangements have been made the other provisions of this chapter relating to the examination, care, treatment, and discharge of patients shall be applicable to the institution and patient involved in the same manner as they apply to the hospital, settlement, or place established under section 326-1. [L 1949, c 392, § 1; am L 1951, c 1951, § 2]

§ 326-4 Officers and employees; sickness and accident; expense. In case any officer or employee of the department of health becomes ill or is injured at the settlement at Kalaupapa and, in the opinion of the physician of the settlement, or in his absence an authorized agent of the department of health, suitable medical, hospital, nursing, or other services or facilities are not available there, the de-

partment will incur and pay the reasonable and necessary expenses of removing and transporting the officer of employee to and from a place within the State where suitable hospital facilities or treatment can be secured. [L 1941, c 108, § 1; RL 1945, § 2405; RL 1955, § 50-6; am L Sp 1959 2d, c 1, § 19; HRS § 326-4; am L 1968, c 63, § 2; am L 1969, c 105, § 1]

§ 326-5 Appropriations, how spent. All moneys at any time appropriated for the upkeep, support, maintenance, and conduct of any hospital, settlement, or receiving station for persons affected with leprosy, shall be expended under the supervision and authority and by the order of the department of health, upon vouchers signed by the director of health. [L 1931, c 139, § 4; am L 1933, c 118, § 1; RL 1935, § 1144; RL 1945, § 2406; am L 1949, c 53, § 3; am imp L 1949, c 109; RL 1955, § 50-7; am L Sp 1959 2d, c 1, § 19; HRS § 326-5; am L 1969, c 152, § 1]

§ 326-6 Treatment and care of pregnant mothers affected with leprosy; disposition of children. Any woman patient at any place maintained for the treatment or care of persons affected with leprosy who becomes pregnant shall be immediately subjected to necessary examination and care as the department of health may prescribe, and within a reasonable time of the possible delivery of child, the mother shall be placed under hospital care and attention as may be necessary to assure a healthy birth. Any child so born shall be immediately cared for as will reduce the possibility of contracting leprosy. [L 1929, c 147, § 2; am L 1931, c 139, § 5; am L 1933, c 118, § 1; RL 1935, § 1146; RL 1945, § 2408; am L 1949, c 53, § 5; RL 1955, § 50-8; am L Sp 1959 2d, c 1, § 19; HRS § 326-6; am L 1969, c 152, § 3]

§§ 326-7 to 10 REPEALED. L 1969, c 152, § 11.

§ 326-11 Voluntary transfer to and from Kalaupapa. Any person undergoing treatment and receiving care for leprosy at Hale Mohalu on [June 30, 1969] may be transferred to Kalaupapa Settlement for care and treatment if he desires. Any person who may undergo treatment and receive care for leprosy at Hale Mohalu after [June 30, 1969] may apply to the director of health for transfer to Kalaupapa Settlement.

Any person undergoing treatment and receiving care for leprosy at Kalaupapa Settlement may be transferred to Hale Mohalu for care and treatment if he desires. A person transferred may be retransferred to Kalaupapa Settlement if he desires. [L 1953, JR 41, § 1; RL 1955, § 50-13; am L Sp 1959 2d, c 1, § 19; HRS § 326-11; am L 1969, c 152, § 4]

§ 326-13 Expenses; rules. The department of health shall bear all expenses of travel and other necessary expenses incurred under sections 326-1 to 326-14; and may prescribe all rules, regulations, and forms and perform all acts necessary and proper for carrying out their provisions. [L 1909, c 81, § 8; RL 1925, § 1190; RL 1935, § 1152; RL 1945, § 2414; RL 1955, § 50-15; am L Sp 1959 2d, c 1, § 19]

§§ 326-14, 15 REPEALED. L 1969, c 152, § 11.

§ 326-16 Rehabilitation of patients on temporary release. All patients on temporary release who can be rehabilitated shall be given the opportunity at the hospital or settlement where they are receiving medical care. Following satisfactory rehabilitation and training, every effort shall be made to assist the patients in securing gainful employment to become readjusted to a normal life in soci-

ety. [L 1953, JR 41, § 4; RL 1955, § 50-18; HRS § 326-16; am L 1969, c 152, § 5]

§§ 326-17 to 19 REPEALED. L 1969, c 152, § 11.

§ 326-20 Permits to treat. The department of health may permit any person to engage in the treatment of persons affected with leprosy or of persons supposed to have leprosy. The permits shall be under such conditions and regulations as the department shall prescribe, and be revocable at the pleasure of the department. [L 1892, c 54, § 1; RL 1925, § 1197; am L 1931, c 139, § 5; am L 1933, c 118, § 1; RL 1935, § 1160; RL 1945, § 2422; am L 1949, c 53, § 15; RL 1955, § 50-22; am L Sp 1959 2d, c 1, § 19; HRS § 326-20; am L 1969, c 152, § 1]

§ 326-21 Labor of patients by consent. The department of health, with the consent of patients, may require the performance of a reasonable amount of labor or service as may be approved by the attending physician. For service rendered, the compensation of a patient shall be set by the department as a percentage of the minimum wage as established by section 387-2. The department shall establish a patient pay plan for six grades of work. The pay for grade I employees shall be equal to fifty-three per cent of the minimum wage as established by section 387-2. The pay for grade VI employees shall be seventy and one-half per cent of the minimum wage as established by section 387-2. There shall be a spread of three and one-half per cent between each of the grades from one to six. The department of health shall set the pay for any other patient employee not covered under the foregoing six grade pay plan.

Each patient employee of the department shall be entitled to and granted a vacation with pay each calendar year, calculated at the following rate:

For patients working six hours a day, one and one-half days for each month of service;

For patients working five hours a day, one and one-quarter days for each month of service;

For patients working four hours a day, one day for each month of service.

A month of service is defined as eighty or more hours of work which may be accumulated over any period of time to total eighty hours. No more than twelve months of service may be earned and credited in any calendar year, even if the total number of hours worked should exceed nine hundred sixty hours. [PC 1869, c 62, § 5; am L 1929, c 149, pt of § 1; am L 1931, c 139, § 5; am L 1933, c 118, § 1; RL 1945, § 2423; am L 1945, c 159, § 1; am L 1949, c 371, § 1 and c 378, § 1; RL 1955, § 50-23; am L 1959, c 146, § 1; am L Sp 159 2d, c 1, § 19; am L 1962, c 28, §32; HRS § 326-21; am L 1968, c 34, § 2; am L 1974, c 115, § 1]

§ 326-22 Labor by patients; employment of released and discharged patients. All outside labor, including yard work, may be performed by patients at any hospital, settlement, or place for the care and treatment of persons suffering from leprosy, as far as patient labor is available, and all the patient laborers shall be compensated in accordance with the rates established in section 326-21.

When there are vacancies in positions, classified under chapters 76 and 77, which are of such nature that the health of the public or of other nonpatient staff members will not be in danger by their being filled by individuals living with or associating closely with active patients, at any hospital, settlement, or place exclusively for the care and treatment of persons suffering from leprosy, employment preference

shall be given to temporary release patients and discharged patients from any such hospital, settlement, or place; provided that the persons so hired shall be otherwise qualified under chapters 76 and 77.

Discharged patients who have been employed prior to December 30, 1960, under chapters 76 and 77 in accordance with the second paragraph of this section shall be eligible to receive the same rights and privileges as those enjoyed by temporary release patients employed under the second paragraph of this section. [L 1937, c 108, § 1; RL 1945, § 2424; am L 1951, c 157; § 11; am L 1953, c 241, § 1; RL 1955, § 50-24; am L 1957, c 10, § 1; am L Sp 1959 2d, c 1, § 19; am L 1961, c 13, § 1; HRS § 326-22; am L 1969, c 152; § 1; am L 1974, c 115, § 2]

§ 326-23 Pensions for patient employees at hospitals, etc. All patient employees or patient laborers at every hospital, settlement, and place maintained for the treatment and care of persons affected with leprosy shall be entitled, upon retirement after twenty years or more service with the department of health, at the hospital, settlement, or place, to a pension, payable monthly, in an amount which shall be equal to sixty-six and two-thirds per cent of the wage or salary which the patient was receiving at the time of retirement, or to a pension, payable monthly, in an amount which shall be equal to sixty-six and two-thirds per cent of the average wage or salary which the patient employee was receiving during his last twelve months of employment at the hospital, settlement, or place, whichever is higher.

Patient employees may use service with any state department or agency not exceeding five years which has not been

credited under the state retirement system in lieu of service with a hospital, settlement, and place maintained for the treatment and care of persons affected with leprosy to satisfy the requirement of the preceding paragraph; provided that the service shall be authenticated by official records of the department where service was performed. [L 1945, c 229, § 1; am L 1949, c 53, § 16; am L 1951, c 157, § 12; RL 1955, § 50-25; am L 1957, c 57, § 1; am L Sp 1959 2d, c 1, § 19; HRS § 326-23; am L 1970, c 43, § 1]

§ 326-24 Rules and regulations. The director of health may adopt rules and regulations pursuant to chapter 91 as he may consider necessary for the conduct of all matters pertaining to leprosy, the treatment thereof, the care, custody, and control of all persons affected with leprosy, and the full and complete governance of the county of Kalawao, except as limited by this chapter. [L 1870, c 33, pt of § 1; RL 1925, § 1199; am L 1931, c 139, § 5; am L 1933, c 118, § 1; RL 1935, § 1162; RL 1945, § 2425; am L 1949, c 53, § 17; am L 1951, c 157, § 13; RL 1955, § 50-26; am L 1965, c 96, § 36; HRS § 326-24; am L 1969, c 152, § 6]

§ 326-25 Accounts, reports. The department of health shall keep an accurate and detailed account of all sums of money expended by it. The department shall report to the legislature at its regular sessions, such expenditures in detail, together with such information regarding leprosy as it may deem to be of interest to the public. [PC 1869, c 62, § 7; RL 1925, § 1200; am L 1931, c 139, § 5; am L 1933, c 118, § 1; RL 1935, § 1163; RL 1945, § 2426; am L 1949, c 53, § 18; RL 1955, § 50-27; am L Sp 1959 2d, c 1, § 19; HRS § 326-25; am L 1969, c 152, § 1]

§ 326-26 Who allowed at settlement. No person, not having leprosy, shall be allowed to visit or remain upon any land, place, or inclosure set apart by the department of health for the isolation and confinement of persons affected with leprosy, without the written permission of the director of health, or some officer authorized thereto by the department, under any circumstances whatever, and any person found upon such land, place, or inclosure without a written permission shall be fined not less than $10 nor more than $100 for such offense; provided that any patient resident of Kalaupapa desiring to remain at the settlement shall be permitted to do so for as long as he may choose, regardless of whether or not he has been successfully treated. [L 1870, c 33, pt of § 1; am L 1903, c 8, § 2; RL 1925, § 1201; am L 1931, c 139, § 5; am L 1933, c 118, § 1; RL 1935, § 1164; RL 1945, § 2427; am L 1949, c 53, § 19; RL 1955, § 50-28; am L Sp 1959 2d, c 1, § 19; HRS § 326-26; am L 1969, c 152, § 1; am L 1977, c 25, § 3]

§ 326-27 Revolving fund for Kalaupapa store. To enable the department of health to operate and maintain the Kalaupapa store, situated at Kalaupapa, Molokai, $10,000 is appropriated as a special fund to be deposited in the state treasury and to be a continual deposit, subject to the control of the department through its director, to be used from time to time in operating and maintaining the Kalaupapa store. All moneys withdrawn from the fund for such purposes shall be reimbursed or restored thereto, so far as may be, out of any moneys received or collected from the sales made in the Kalaupapa store and shall then be available for further use. [L 1915, c 15, § 1; RL 1925, § 1202; am L 1931, c 139, § 5; am L 1933, c 118, § 1; RL 1935, § 1165; RL 1945, §2428; RL 1955, § 50-29; am L Sp 1959 2d, c 1, §19]

§ 326-28 Kalaupapa store prices; penalty. It shall be unlawful for the department of health or its agents to sell or offer for sale any merchandise at the Kalaupapa store at prices exceeding the actual cost thereof, free on board steamer or any other means of transportation at Honolulu. Any person violating this section shall be fined $25 and in addition thereto shall, in the discretion of the department, be subject to removal from office. [L 1927, c 245, §§ 1, 2; am imp L 1931, c 139, § 5; am imp L 1933, c 118, § 1; RL 1935, § 1166; RL 1945, § 2429; am L 1949, c 80, § 1 (4); RL 1955, § 50-30; am L Sp 1959 2d, c 1, § 19]

§ 326-29 Fishing laws exemption; Kalaupapa. Notwithstanding any provision of law to the contrary, state laws on fishing shall not be applicable to leprosy patients of Kalaupapa settlement, provided the patients engage in fishing along the shorelines and in waters immediately adjacent to the county of Kalawao.

No fish or other marine products obtained by patients may be sold outside of the county of Kalawao.

The department of health shall adopt rules and regulations to control all fishing and acquisition of marine products by leprosy patients. [L 1957, c 106, §§ 1-3; am L Sp 1959 2d , c 1, § 19; Supp § 50-41; HRS § 326-29; am L 1969, c 152, § 1]

§ 326-30 Making or taking of pictures without permission prohibited. Except for professional purposes, no person, other than members of the staff, shall take photographs of any patient confined at any hospital, settlement, or place for the care and treatment of persons affected with leprosy, without the written permission of the patient. [L 1923, c 78, §§ 1, 2; RL 1925, § 1203; am L 1925, c 98, § 1;

am L 1931, c 139, § 5; am L 1933, c 118, § 1; RL 1935, § 1167; RL 1945, § 2430; am L 1949, c 80, § 1 (5); am L 1951, c 157, § 14; RL 1955, § 50-31; HRS § 326-30; am L 1969, c 152, § 7]

§§ 326-31, 32 REPEALED. L 1969, c 152, § 11.

§ 326-33 Damien Memorial Chapel. The Father Damien Memorial Chapel at Kalawao, Molokai, and the premises and graveyard thereof are hereby declared to be a public memorial to Father Damien. [L 1935, c 38, § 1; RL 1945, § 2437; RL 1955, § 50-34]

§ 326-34 County of Kalawao governed by department of health. The county of Kalawao shall be under the jurisdiction and control of the department of health and be governed by the laws, rules, and regulations relating to the department and the care and treatment of persons affected with leprosy, except as otherwise provided by law. [L 1905, c 39, § 2; RL 1925, § 1577; am L 1931, c 138, § 1; am imp L 1933, c 118, §§ 1, 2; RL 1935, § 2928; RL 1945, § 2438; am L 1949, c 53, § 26; am L 1951, c 157, § 15; RL 1955, § 50-35; am L Sp 1959 2d, c 1, § 19; HRS § 326-34; am L 1969, c 152, § 8]

§ 326-35 Sheriff, appointment, removal. There shall be no county officer in the county other than a sheriff, who shall be a resident of and be appointed in the county by the department of health and who shall hold office at the pleasure of the department or until his successor is appointed by the department. [L 1905, c 39, § 3; am L 1911, c 134, § 1; RL 1925, § 1578; am L 1931, c 138, § 1; am imp L 1933, c 118, §§ 1, 2; RL 1935, § 2929; RL 1945, § 2439; am L 1951, c 157, § 16; RL 1955, § 50-36; am L Sp 1959 2d, c 1, § 19]

§ 326-36 Sheriff, salary. The salary of the sheriff shall be fixed and paid by the department of health out of the appropriation allowed by the legislature for the care and treatment of persons affected with leprosy. [L 1905, c 39, § 4; RL 1925, § 1579; am L 1931, c 138, § 1; am imp L 1933, c 118, §§ 1, 2; RL 1935, § 2930; RL 1945, § 2440; am L 1949, c 53, § 27; am L 1951, c 157, § 17; RL 1955, § 50-37; am L Sp 1959 2d, c 1, § 19; HRS § 326-36; am L 1969, c 152, § 9]

§ 326-37 Sheriff, duties. The sheriff of the county of Kalawao shall preserve the public peace and shall arrest and take before the district judge for examination all persons who attempt to commit or who have committed a public offense and prosecute the same to the best of his ability. [L 1905, c 39, § 5; RL 1925, § 1580; RL 1935, § 2931; RL 1945, § 2441; RL 1955, § 50-38; HRS § 326-37; am L 1970, c 188, § 39]

§ 326-38 Sheriff, powers. The sheriff may appoint and dismiss and reappoint as many policemen as may be authorized by the department of health for the county who, for the services rendered as policemen, shall receive pay as the department determines and which pay shall be taken out of and from the appropriation made by the legislature for the care and treatment of persons affected with leprosy. The sheriff shall have other powers and duties within the county of Kalawao and appropriate thereto as are prescribed by law for the chiefs of police or police officers of the several counties respectively. [L 1905, c 39, § 6; RL 1925, § 1581; am L 1931, c 138, § 1; am imp L 1933, c 118, §§ 1, 2; RL 1935, § 2932; RL 1945, § 2442; am L 1949, c 53, § 28, and c 80, § 1 (7); am L 1951, c 157, § 18; RL 1955,

§ 50-39; am L Sp 1959 2d, c 1, § 19; HRS § 326-38; am L 1969, c 152, § 10]

§ 326-39 Penalty. Any person violating this chapter, or any rule or regulation of the department of health relating thereto, shall be deemed guilty of a misdemeanor. Except as herein otherwise provided, the punishment therefor shall be the same as provided by section 321-18. [1951, c 157, § 19; RL 1955, § 59-40; am L Sp 1959 2d, c 1, § 19]

[§ 326-40] Kalaupapa; policy on residency. The legislature finds that Hawaii's leprosy victims have in many ways symbolized the plight of those afflicted with this disease throughout the world. Their sufferings and social deprivations helped eventually to bring the story of the disease and an understanding of its health ravages to people everywhere. Those patients who settled in Kalaupapa remain a living memorial to a long history of tragic separation, readjustment, and endurance.

It is the policy of the State that the patient residents of Kalaupapa shall be accorded adequate health care and other services for the remainder of their lives. Furthermore, it is the policy of the State that any patient resident of Kalaupapa desiring to remain at the settlement shall be permitted to do so for as long as he may choose, regardless of whether or not he has been successfully treated. [L 1977, c 25, § 2]

§ 247e. Receipt, apprehension, detention, treatment, and release of lepers

(a) The Service shall, in accordance with regulations, receive into any hospital of the Service suitable for his

accommodation any person afflicted with leprosy who presents himself for care, detention, or treatment, or who may be apprehended under subsection (b) of this section or section 264 of this title, and any person afflicted with leprosy duly consigned to the care of the Service by the proper health authority of any State. The Surgeon General is authorized, upon the request of any health authority, to send for any person within the jurisdiction of such authority who is afflicted with leprosy and to convey such person to the appropriate hospital for detention and treatment. When the transportation of any such person is undertaken for the protection of the public health the expense of such removal shall be met from funds available for the maintenance of hospitals of the Service. Such funds shall also be available, subject to regulations, for transportation of recovered indigent leper patients to their homes, including subsistence allowance while traveling. When so provided in appropriations available for any fiscal year for the maintenance of hospitals of the Service, the Surgeon General is authorized and directed to make payments to the Board of Health of Hawaii for the care and treatment in its facilities of persons afflicted with leprosy at a per diem rate, determined from time to time by the Surgeon General, which shall, subject to the availability of appropriations, be approximately equal to the per diem operating cost per patient of such facilities, except that such per diem rate shall not be greater than the comparable per diem operating cost per patient at the National Leprosarium, Carville, Louisiana.

(b) The Surgeon General may provide by regulation for the apprehension, detention, treatment, and release of persons being treated by the Service for leprosy.

U.S. Constitution amend. XIV § 1:

> All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.